STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

THE PLASTIC SURGERY GROUP OF ROCHESTER LLC,

Plaintiff, DECISION AND ORDER

v. INDEX No. 2005/04911

STEPHEN M. EVANGELISTI, MD,

Defendant and Counter-claims Plaintiff,

v.

RALPH P. PENNINO, MD, TIMOTHY P. O'CONNOR, MD and ASSOCIATES IN PLASTIC AND HAND SURGERY,

Defendant.

There is "no common-law accountant's or taxpayer's privilege." U.S. v. Fredrick, 182 F.3d 496, 500 (7th Cir. 1999)(Posner, J.)(citing US v. Arthur Young & Co., 465 U.S. 805, 817, 104 S. Ct. 1495, 1503 (1984)(no accountant's work product immunity)); Couch v. U.S., 409 U.S. 322, 335, 93 S. Ct. 611, 619 (1973)("no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases"). "Moreover, the accountant-client privilege is not one commonly accorded and it . . . was unknown at common law." Armour Intern. Co. v. Worldwide Cosmetics, Inc., 689 F.2d

134, 136 (7th Cir. 1982)(citing 8 J. Wigmore, Evidence 529-30 (McNaughton Rev. 1961)). See First Interstate Credit Allowance, Inc. v. Arthur Anderson & Co., 150 A.D.2d 291, 292 (1st Dept. 1989)("New York, it should be noted, has no comparable accountant-client privilege."); Delta Financial Corp. v. Morrison, __ Misc.3d __, 2006 WL 2085469 (Sup. Ct. Nassau Co. July 26, 2006)("client's communications with its accountants are not afforded special protections under New York Law and are subject to full disclosure"). Plaintiff's effort to distinguish these cases is wholly unavailing. Accordingly, the motion to compel disclosure of communications to Kane is granted, and a conditional order of contempt may be submitted and entered.

Given that there was proof here that the accountant simply accepted the Quicken printout provided by the LLC without independent audit or review and without expressing an opinion on the work product the LLC provided, this case is like Tatko v. Tatko Bros. Slate Co., 173 A.D.2d 917, 918-19 (3d Dept. 1995) which distinguished Matter of Baron and ordered disclosure. Notwithstanding the LLC's contention that the agreement provided no requirement that accepted accounting practices be used, applicable law is that, "not only that the entries be complete and correct, but that accepted accounting principles not be entirely disregarded." Id. 173 A.D.2d at 918 (citing Aron v. Gillman, 309 N.Y. 157, 160). Accordingly, disclosure is not so

limited as the LLC insists and "can, if necessary, be subject to a protective order limiting the release of such information." Dyer v. Indium Corp. of America, 2 A.D.3d 1195, 1197 (3d Dept. 2003)(citing Matter of Tatko, supra). Thus, although "the price-fixing standard provided by the parties' stockholders' agreement is a legally enforceable determinant[,] . . . [c]omputing book value may often involve inquires concerning the conclusiveness of corporate books of account and financial reports. . . . Nevertheless, as Aron v. Gillman, supra, indicates if accepted accounting principles are used and book entries appear to be correct and comprehensive, a book value for closely held stock is objectively ascertainable . . ." Claire v. Wigdor, 24 A.D.2d 992 (2d Dept. 1965).

The cases cited by the LLC for the proposition that disclosure should be precluded by reason of the price-fixing provision in the agreement are inapposite. Matter of Mona Lambe-Marcille v. Sally Lou Fasteners Corp., 289 A.D.2d 162 (1st Dept. 2001) and Matter of Glassman v. Louis Shiffman, Inc., 56 A.D.2d 824 (1st Dept. 1977) speak of an accountant's "unchallenged" report precluding an audit. Baron involved "no claim that the accountant's report does not reflect the books." 36 A.D.2d at 113. Here the counterclaims directly challenge the expense figures and the proof on this motion is that Kane simply accepted the Quicken printout submitted by the LLC. Tatko, 173 A.D.2d at

918. Accordingly, the LLC's effort to limit discovery by reason of price-fixing provision is without merit.

Finally, I agree that the use of Exhibit Z in Exh. AA in the LLC's summary judgment motion operated as a waiver of the privilege with respect to communications encompassing the negotiation and drafting of the agreements in the December 2003 time frame and before. The LLC concedes the admissibility of Exh. Z, makes no serious attempt to prove non-waiver and it has the burden to do so, Manufacturers and Traders Trust Co. v. Servotronics, Inc., 132 A.D.2d 392, 398-99 (4th Dept. 1987); Delta Financial Corp. v. Morrison, 12 Misc.3d 807, 810 (Sup. Ct. Nassau Co. 2006), and only seeks to limit the scope of the waiver. But when the use of privileged material is offensive, as the LLC's use of it here was, there is a subject matter waiver which is not limited to the document revealed offensively in litigation. The applicable rule is as follows:

> The Court finds most persuasive the argument that when one party intentionally discloses privileged material with the aim, in whole or in part, of furthering that party's case, the party waives its attorney-client privilege with respect to the subject-matter of the disclosed communications. See In re Leslie Fay Cos., Inc. Sec. Litig., 161 F.R.D. 274, 282 (S.D.N.Y.1995) ("Based principally on notions of fairness, courts have imposed such a 'subject matter waiver' most often when the privilege-holder has attempted to use the privilege as both 'a sword' and 'a shield' or when the party attacking the privilege will be prejudiced at trial."); Edwards, 868 F.Supp. at 229; Hundley, supra, § 9, and cases cited therein. As many courts have noted, the attorney-client privilege is a shield used to protect communications, not a sword wielded to gain an

> advantage in litigation. Leslie Fay, 161 F.R.D. at 282; Valenti v. Allstate Ins. Co., 243 F.Supp.2d 200, 220 (M.D.Pa.2003) ("Counsel is reminded that privilege is a shield not a sword."). Where one party attempts to utilize the privilege as an offensive weapon, selectively disclosing communications in order to help its case, that party should be deemed to have waived the protection otherwise afforded it by the privilege it misused.

Murray v. Gemplus Intern., S.A., 217 F.R.D. 362, 357 (E.D.Pa. 2003). Here, defendant sought to create an issue of fact on the prior motion for summary judgment by suggesting that the parties did not discuss a liquidated damages clause in their negotiations. The LLC used privileged material in litigation to show otherwise. Accordingly, the effort to distinguish In re von Bulow, which itself recognized the harsher rule in the litigation context, is unavailing.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: August 25, 2006
Rochester, New York